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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 192

WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY, DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and ROY HENRY STORES, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

JOHN W. DAILEY, ROBERT E. LUKENS and JAMES F. BOGUE, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

WILLIAM LLOYD BARNARD, WALTER H. MORSE and HOMER A. KELLEY, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and WILLIAM LLOYD BARNARD, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners in the above described consolidated cases, by their attorneys, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in these causes on May 2, 1958.

OPINIONS BELOW.

The United States District Court for the District of Kansas sustained motions to dismiss the indictments against petitioners without opinion on August 26, 1957. After appeal by the United States, the various cases were consolidated by order of the Court of Appeals January 9, 1958. The opinion of the Court of Appeals has not yet been reported, but appears in the record on Certiorari at pages 4 to 19,[1] and a printed copy thereof is appended to this petition. No opinion was rendered by the Court of Appeals in denying the Petition for Rehearing.

JURISDICTION.

The judgment of the Court of Appeals for the Tenth Circuit sought to be reviewed, was dated May 2, 1958, and entered on the same date (R. 20). Petition for rehearing was denied on May 23, 1958 (R. 26). Time within which to file petition for certiorari was extended by this Court on June 22 to July 22, 1958.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Does a "cost-reimbursable" contract under the anti-kickback statute include a contract which provides for the payment of a unit price and which does not require that the government reimburse costs?

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[1]Certified record on certiorari is hereinafter referred to and identified as "R." Certified copy of the record printed for use in the Court of Appeals is hereinafter referred to and identified as "PR."

2. Does the Code of Federal Regulations have the force of law to define or limit the provisions of a contract for military aircraft between the United States and a prime contractor, and determine whether it is cost-reimbursable or a fixed-fee contract, and does the Code so limit the negotiating authority of contracting officers?

3. May an accused be charged and convicted of the crime of conspiracy to violate the anti-kickback statute without allegation and proof that he knew that the contractual relationship between the prime contractor and the government was a prohibited one under the statutes?

STATUTES INVOLVED.

Title 41, U.S.C. 151-162 (now Title 10, Sec. 2301-2314), the pertinent parts of which are set out in Appendix B. 32 Code of Federal Regulations 3.403, 3.404, 1.400, 1.403(a) (Appendix C).

R.S. 161, 5 U.S.C. 22, 62 Stat. 21, Sec. 638, 66 Stat. 537, gives Secretary of Defense authority to promulgate regulations to govern procurement, and are not reproduced verbatim herein.

STATEMENT OF CASE.

The District Court dismissed the indictments in these cases. The judgment which this Court is now asked to review is that of the Tenth Circuit Court of Appeals reversing the District Court judgment and remanding the cases.

The indictments (PR. 1-7, 105-108, 117-120, 129-130) are founded on alleged violations of Title 41, U. S. C., Sections 51, 52, and 54, commonly called the Anti-Kickback

Statute (Appendix B). In general it prohibits the giving of gifts or gratuities by subcontractors to employees of a prime contractor having a contract with the United States, when such prime contract is on a *"Cost-plus-a-fixed-fee, or other cost reimbursable basis."*

In the indictments it is alleged that the contract in question, AF 33(038)-18503, is a "fixed price reimbursable" contract.[1] The pertinent portions of this contract are reproduced in the record which was printed for the use of the court below (PR. 9-94). In order that the District Court could determine whether the prime contract in question was of the type contemplated by the statute, it was, by agreement of the parties, submitted to the Court prior to its ruling on the motions to dismiss.

It is a contract between the United States Air Force and General Motors Corporation. Some of the defendants are subcontractors who furnished supplies (tools) to General Motors and are charged with giving gifts and gratuities to certain employees of General Motors, the employees being the other defendants.

The Air Force contract is designated throughout as a "Fixed Price Contract." (For example, PR. 57, 61, 65, 69, 87). It is classified under the Code of Federal Regulations as a type of "fixed-price" contract (appendix C). The indictments call it a "fixed price reimbursable" contract (PR. 2, 97, 106, 118). Furthermore, until recently released, it carried a "Restricted" security classification (PR. 9).

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[1]Contract No. AF 33(038)-18504 is not in issue here, as it is agreed by the Government that defendants were in no way connected with the performance of that contract. However, note that the indictments refer to it, in the language of the statute, as "cost reimbursable", whereas they refer to the contract with which defendants *were* concerned as "fixed price reimbursable", which is *not* covered by the statute (PR. 2, 97, 106, 118).

Of course, none of the defendants was a party to said contract. It provides for a retrospective renegotiation of prices after the completion of the first 71 airplanes built. The Air Force is not *required* by the terms of the contract to reimburse General Motors for its costs. It only permits the consideration of costs, along with all other data usually considered in negotiating prices *under a new contract* (PR. 32).

Whether it be the original price, or a renegotiated price, it is a price of so much *per unit*, under the terms of the contract, and is not controlled by the amount of the contractor's costs.

Lastly, nowhere do the indictments charge that the defendants had any knowledge that the contract between General Motors and the Air Force was of the "cost-reimbursable" type so as to render criminal the practice of giving gratuities in the hope of obtaining contracts.

The opinion of the Tenth Circuit Court of Appeals (appendix A) holds that it is not necessary to charge that defendants had knowledge of the nature of the prime contract; that, despite the fact that the parties to the prime contract designated it a fixed price contract, and despite the fact that the Code of Regulations define it as such, it in fact "partakes" of the characteristics of *both* a fixed price and a cost reimbursable contract—and that defendants must stand trial.

REASONS RELIED ON FOR GRANTING THE WRIT.

I.

The Tenth Circuit Court of Appeals has decided an important question of Federal defense contract law and regulation, not yet decided by this Court, which decision is in conflict with decisions of other circuits, and with Acts of Congress and Executive Regulation, as well as the contract itself.

1. The Tenth Circuit Court of Appeals has in this matter decided an important question of Federal law which has not yet been settled by this Court, and which is in disagreement with the decision reached by District Courts in other circuits as well as with the duly adopted regulations of the Defense Department. A decision by this Court would end any inconsistencies or ambiguities existing and introduce certainty into the interpretation of government contracts for war materiel, and in defining the area of authority of contracting officers, and their power to bind the government. An answer would relieve the government of any uncertainty as to its position in billions of dollars worth of contract liability with which it must deal in providing for national defense and other purposes. A failure to provide an answer might mean a great and otherwise unnecessary increase in the expense of the defense establishment and would also increase the uncertainties of the citizen who deals with the government, in knowing whether he has a valid contract and can rely on the Federal Regulation, or is at the mercy of some oversight by the government representative, over whose decisions he has no control. The effect of the decision of the Circuit Court is to strike down the Code of Federal Regulations promulgated by the Defense Department under authority of the Acts of Congress,

now Title 10, U. S. C. A. 2301-2314, which prescribes the form and limitations of the various contracts for defense materials and establishes the methods of procurement of these supplies.

The decision of the Court of Appeals, in question, reached an incorrect conclusion entirely contrary to the intent of Congress and of the Regulations. It has long been the rule that regulations adopted by an executive department under legislative authority have all the force of law, as this Court declared in *Commissioner of Internal Revenue* v. *Wheeler*, 65 S. Ct. 799, 324 U.S. 542. The opinion below is inconsistent with the Wheeler decision, and also with the decision in *Sheridan-Wyoming Coal Co.* v. *Krug*, 172 F.2d 282, and with the decision of the Second Circuit in *Hewitt* v. *Speyer*, 250 Fed. 367, 162 C. C. A. 437.

The United States is bound in contract only when the contract is adopted pursuant to the applicable provisions of statute authorizing the activity or expenditure, and a governmental representative has no carte blanche to bind the government he represents to any contract he may see fit to negotiate. *The Court of Appeals has stated (Opinion page 17) that the Regulation is valid for civil purposes but not criminal.* There is an obvious inconsistency here that this Court should correct, else the Regulation means "fixed price" for all purposes of contract negotiation and civil performance, and "cost reimbursable" for criminal purposes. The words should mean the same in either situation, and the contracting party which is conducting this prosecution has already declared the definition of this as a "fixed price" contract. Further, Section 51, Title 41, U. S. C. A., does not repeal the Regulation. Consequently, the Court of Appeals has erred here.

The regulations and the law are a part of the contract for all purposes and there is no conflict between

the civil and the criminal phases. Section 51, Title 41, simply operates on the contract situation as it is determined under the regulations and statutes. The inconsistency created by the Court of Appeals should be eliminated.

2. In holding that the contract is both a "cost reimbursable" and a "*fixed price*" contract, the Court of Appeals has again introduced an element of inconsistency and confusion into the field of government contract law which this Court has not yet passed upon, but which this Court could clarify by a decision. The contract itself is everywhere marked and designated a "fixed price" contract (PR. 42) (PR. 43) (PR. 57) (PR. 61) and further contains these restrictions (P.R. 32, 33):

> (d) Negotiations.—(1) Upon the filing of the statements and data required by paragraph (c) of this Clause, the Contractor and the Contracting Officer will negotiate promptly in good faith to agree upon prices for items *to be delivered* on and after the effective date of the price revision. Negotiations for price revisions under this Clause shall be conducted on the same basis, employing the same types of data (including, without limitations, comparative prices, comparative costs, and trends thereof) as in the negotiation of prices under a New Department of the Air Force contract.
>
> (2) After each negotiation the agreement reached will be evidenced by a supplemental agreement stating the revised prices to be effective with respect to deliveries *on and after the effective date of the price revision* (or such other later date as the parties may fix in such supplemental agreement).

Furthermore, the decision below is in conflict with the decision of the Second Circuit in *Symington Co.* v. *C. I. R.*, 33 F. 2d 372, upholding the petitioners' contention in this matter. Nowhere in the contract is there any formula ex-

pressed for the determination of any margin of profit to the prime contractor, nor is there any provision requiring reimbursement to the prime contractor of its cost, but it requires only that the parties negotiate.

The trial court in these cases was of the opinion that the matter should be dismissed. The United States District Court for the Eastern District of Pennsylvania in an unreported opinion in United States of America against James Samuel Morris *et al.*, 18535, dismissed a case and discharged the defendants, where the contract was identical to the one in the case at bar. The Court ordered a copy of his remarks transmitted to the Attorney General of the United States in the event that he wished to approach Congress on the subject of changing the law to include this particular type of contract.

II.

The opinion below, in holding that the indictments were sufficient even though they failed to allege knowledge by defendants of the nature of the prime contract, conflicts with prior decisions of this court and with opinions of other circuits.

The decision below should be reviewed because it upholds the sufficiency of the indictments even though they fail to allege, and thus eliminate the necessity of proof, that the defendants tendered or received the alleged gratuities prohibited under Section 61, Title 41, U.S.C., *knowing that General Motors was a prime contractor with a department of the United States on a cost-plus-a-fixed-fee or other cost-reimbursable basis.*

In so holding, the Tenth Circuit Court of Appeals followed without additional reasoning the opinion of the Eighth Circuit in *Hanis* v. *United States*, 246 F.2d 781, and

thus perpetuated a dangerous concept of the requirements of "guilty knowledge" necessary to convict, going far beyond boundaries heretofore established.

The decision below in this regard is irreconcilably in conflict with the prior decisions of this court in *United States* v. *Cruikshank*, 92 U.S. 542, 23 L. Ed. 588; *United States* v. *Carll*, 105 U.S. 611, 26 L. Ed. 1135; *Pettibone* v. *United States*, 148 U.S. 147, 13 S. Ct. 542, 37 L. Ed. 419; *Automatic Canteen Company of America* v. *Federal Trade Commission*, 346 U.S. 61, 73 S. Ct. 1017, 97 L. Ed. 1454, and *Morisette* v. *United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288. Furthermore, the opinion below and the opinion of the Eighth Circuit in *Hanis* v. *United States, supra*, also conflict with the opinion of the Fifth Circuit Court of Appeals in *United States* v. *Twelve Miami Digger Slot Machines*, 213 F.2d 918, the Court of Appeals of District of Columbia in *Moens* v. *United States*, 267 Fed. 317, and the Ninth Circuit in *Crank* v. *United States*, 61 F.2d 620. In fact, the opinions in the court below and in the Hanis case cannot be reconciled with the prior Eighth Circuit opinion in *St. Joseph Stockyards* v. *United States*, 187 Fed. 104.

The indictments uniformly allege that the various defendants knowingly conspired to violate the provisions of the "anti-kickback" statute (PR. 1, 5, 6, 105, 117, 119, 120, 129). The indictments then recite that General Motors Corporation was a prime contractor with the United States under a "fixed price reimbursable contract with a price redetermination clause." Continuing, the indictments charge that defendants, either as suppliers of General Motors or as employees of General Motors paid or received various gifts or compensation for the purpose of obtaining and procuring the award of subcontracts.

At no place do the indictments further charge that the defendants gave or received the alleged gifts *knowing that*

General Motors was a prime contractor with the United States under a cost-plus or cost-reimbursable contract.

If the Court of Appeals decision is permitted to stand, these defendants may be convicted of a serious felony offense punishable by penitentiary sentence up to ten years and never have had any knowledge or notice that their activities were prohibited.

The practice of showering favors on purchasing agents with hope of obtaining orders is perfectly acceptable in private industry and is likewise lawful where the prime contractor is supplying the United States, so long as the contract between the two is not a cost-plus-a-fixed-fee contract or other cost-reimbursable contract. It is the existence of this type contract which makes criminal a practice otherwise neither *malum prohibitum* or *malum in se*. Thus, it is an essential element of intent or *mens rea* that the accused be charged with, and the proof disclose, knowledge of the existence and character of the prime contract with the United States so as to put him on notice that the practice, otherwise lawful, is a crime.

The failure of the Tenth Circuit Court of Appeals below or the Eighth Circuit in *Hanis* v. *United States, supra,* to require the allegation and proof of guilty knowledge as required by the express language of Section 54 is contrary to the opinion of this court in *Morisette* v. *United States, supra.* In that case it was charged that defendant "did unlawfully, wilfully and knowingly steal and convert" property of the United States. The evidence disclosed that the defendant had taken shell casings from a tract of uninhabited land upon which the government had established a bombing range, which he discovered while hunting deer and which he believed to be abandoned. This court held that a "knowing conversion" as required by the statute required more than mere knowledge that the defendant was

taking the property into his possession. "He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." (l.c. 271).

Since fundamental principles of liberty are at stake, it is important that this court review the decision below so as to guide the policies of the multitude of businessmen engaged either directly or indirectly in the vast governmental spending program. Particularly is this true when, as here, the decision sought to be reviewed is so repugnant to the historical concept of justice and fair play as to permit conviction and imprisonment of men who have no knowledge of the facts which make criminal their engaging in practices that are accepted throughout private industry and lawful even where the government is the ultimate purchaser, except in the limited instances where the contract between the prime contractor and the government is on a cost-plus-a-fixed-fee or other cost-reimbursable basis.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

MARCH TERM—1958.

UNITED STATES OF AMERICA, *Appellant,* vs. WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY, DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and ROY HENRY STOUT, *Appellees.*	**Number 5786.**
UNITED STATES OF AMERICA, *Appellant,* vs. JOHN W. DAILEY, ROBERT E. LUKENS, and JAMES F. BOGUE, *Appellees.*	**Number 5787.**
UNITED STATES OF AMERICA, *Appellant,* vs. WILLIAM LLOYD BARNARD, WALTON H. MORSE, and HOMER A. KELLEY, *Appellees.*	**Number 5788.**
UNITED STATES OF AMERICA, *Appellant,* vs. DONALD HENRY SMALLIGAN, PETER JOHN SMEDES, and WILLIAM LLOYD BARNARD, *Appellees.*	**Number 5789.**

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Milton P. Beach, Assistant United States Attorney (William C. Farmer, United States Attorney, was with him on the brief), for Appellant.

J. A. Dickinson and Patrick J. Warnick (David Prager, William W. Dimmitt, Jr., Sam A. Crow, Donald C. Little, Alvin C. Randall, Edwin Earnshaw, Roscoe C. Van Valkenburgh, James E. Lockwood, Arn & Mullins, and Joseph H. McDowell were with them on the brief), for Appellees.

Before BRATTON, Chief Judge, and HUXMAN and MURRAH, Circuit Judges.

BRATTON, Chief Judge:

These four criminal cases present for determination questions of law common to all of them and therefore the cases may be considered together.

In the first case, William Lloyd Barnard, John W. Dailey, Charles W. Humphrey, Donald Henry Smalligan, Peter John Smedes, and Roy Henry Stout were defendants; in the second case, John W. Dailey, Robert E. Lukens, and James F. Bogue were defendants; in the third case, William Lloyd Barnard, Walton H. Morse, and Homer A. Kelley were defendants; in the fourth case, Donald Henry Smalligan, Peter John Smedes, and William Lloyd Barnard were defendants; and for convenience, reference will be made to the several defendants as Barnard, Dailey, Humphrey, Smalligan, Smedes, Stout, Lukens, Bogue, Morse, and Kelley, respectively.

The indictment in the first case contained five counts. The first count charged that all of the defendants in that case entered into a conspiracy to violate Sections 51, 52, and 54, Title 41, United States Code, in the manner and by the means therein set forth. This was the manner and these were the means set forth in the count. General Motors Corporation was the prime contractor with the United States Air Force under a fixed price reimbursable contract with a price redetermination clause for the furnishing of airplanes. The prime contract was supplemented by a special facilities contract providing for cost reimbursement for the tools and equipment necessary to perform the contract to build airplanes. Barnard was employed by General Motors as head tool buyer, in which capacity he administered subcontracts and purchase orders awarded to other manufacturers and suppliers for the purchase of tools, equipment, and materials to be used in completing and furnishing the airplanes under the prime contract. Dailey was employed by General Motors as a tool buyer; later he became head tool buyer; and in such capacities, respectively, he administered subcontracts and purchase orders awarded to other manufacturers and suppliers for the purchase of tools, equipment, and materials to be used in completing and furnishing airplanes under the prime contract. Stout was an employee of General Motors. He resigned such position and became one of the owners of Plastic Tooling, Inc., a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the prime contract. Smalligan and Smedes were the owners of Tri-Arts Industries, Inc.; and after a specified date, Smalligan, Smedes, and Stout became the owners of Plastic Tooling, Inc., each of which firms was a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the prime con-

tract. Humphrey was one of the owners or officers of Summit Engineering Company, a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the prime contract. Stout was one of the owners of Magic Circle Tool Engineering Company, a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the prime contract. And it was the plan and purpose of the conspiracy that Barnard and Dailey would accept payments of fees, commissions, gifts, gratuities, and compensations paid by Humphrey, Smalligan, Smedes, and Stout as inducements for the aid and assistance of Barnard and Dailey in obtaining and procuring the award of purchase orders and subcontracts in favor of the firms mentioned in the indictment.

The second count charged that Smalligan, Smedes, and Stout, knowingly and unlawfully on behalf of a subcontractor, gave to Dailey, an officer, employee, and agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States for the furnishing of supplies, equipment, materials, and services on a cost reimbursement basis, and Dailey, knowingly and unlawfully received, an automatic clothes washer and a clothes drier, as an inducement for the awarding of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts and orders previously awarded. The third count charged that Smalligan and Smedes, on behalf of a subcontractor, knowingly and unlawfully, gave to Barnard, an officer, employee, and agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States for the furnishing of supplies, equipment, materials, and services on a cost reimbursement basis, and Barnard, knowingly and unlawfully received, the sum of $3,004.20 as an

inducement for the awarding of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts and orders previously awarded. The fourth count charged that Stout, on behalf of a subcontractor, knowingly and unlawfully gave to Dailey, an officer, employee, or agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States, and Dailey, knowingly and unlawfully received, an automatic dishwasher of the value of $260 as an inducement for the awarding of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts and orders previously awarded. And the fifth count charged that Stout, on behalf of a subcontractor, kn ingly and unlawfully, gave to Dailey, an officer, employee, or agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States for the furnishing of supplies, equipment, materials, and services on a cost reimbursement basis, and Dailey, knowingly and unlawfully received, $610 as an inducement for the awarding of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts and orders previously awarded.

The indictment in the second case contained only one count. It charged that Dailey, Lukens, and Bogue conspired to violate Sections 51, 52, and 54, *supra*. The substance of the conspiracy as pleaded was that General Motors entered into the contract with the Air Force to furnish the airplanes; that Dailey was employed by General Motors as a tool buyer; that in such capacity he administered subcontracts and purchase orders awarded to other manufacturers and suppliers for the purchase of tools, equipment, and materials to be used in completing and furnishing the airplanes; that Lukens was president and Bogue was sales manager of Lukens Aluminum Corporation, and Lacorp

Machine Tool Company; that each firm was a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the contract; that Lukens and Bogue, on behalf of Lukens Aluminum Corporation and Lacorp Machine and Tool Company, solicited and received orders to furnish tools, equipment, and materials to General Motors; and that it was the plan and purpose that Dailey would accept from Lukens and Morse payments of fees, commissions, gifts, gratuities, and compensations as an inducement for the aid and assistance of Dailey in obtaining and procuring the award of purchase orders and subcontracts in favor of Lukens Aluminum Corporation and Lacorp Machine and Tool Company.

The indictment in the third case contained three counts. The first count charged that Barnard, Morse, and Kelley conspired to violate Sections 51, 52, and 54, *supra*. The substance of the conspiracy as pleaded was that General Motors and the Air Force entered into the contract for the furnishing of airplanes; that Barnard was employed by General Motors as tool buyer, in which capacity he administered subcontracts and purchase orders awarded to other manufacturers and suppliers for the purchase of tools, equipment, and materials to be used in completing and furnishing the airplanes; that Morse and Kelley were partners in the Mead Manufacturing Company, a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of the airplanes; that Morse and Kelley, on behalf of Mead Manufacturing Company, solicited orders to furnish tools, equipment, and materials to General Motors and received orders which orders were produced and supplied; and that it was the plan and purpose that Barnard would accept payments of fees, commissions, gifts, gratuities, and

compensations paid by Morse and Kelley as an inducement for his aid and assistance in obtaining and procuring the award of purchase orders and subcontracts in favor of Mead Manufacturing Company. The second count charged that Morse and Kelley, on behalf of a subcontractor, knowingly and unlawfully paid to Barnard, an officer, employee, and agent of a prime contractor for the furnishing of supplies, materials, equipment, and services on a cost reimbursable basis, and Barnard, knowingly and unlawfully received from Morse and Kelley, the sum of $587 as an inducement for the award of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts or orders previously awarded. And the third count charged that Morse and Kelley knowingly and unlawfully paid to Barnard, and Barnard knowingly and unlawfully received from Morse and Kelley, $522 as an inducement for the award of subcontracts or orders and as acknowledgment of subcontracts and orders previously awarded.

And the indictment in the fourth case contained a single count. It charged that Smalligan and Smedes, on behalf of a subcontractor, knowingly and unlawfully gave to Barnard, formerly an officer, employee, and agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States for the furnishing of supplies, equipment, and materials, and services on a cost reimbursement basis, and Barnard, knowingly and unlawfully received the sum of $3,004.20 as an acknowledgment of subcontracts and orders awarded during the time Barnard was acting as such officer, employee, and agent.

Motions were filed to dismiss the several indictments. The substance of the motions in the first, second, and third cases was in each instance that the indictment failed

to state facts sufficient to constitute an offense against the United States; that the indictment was fatally defective for failure to allege the existence of a "cost-plus-a-fixed-fee or other cost reimbursable basis" contract; and that upon production and examination, the contract disclosed upon its face that it was a "fixed price" contract and not a "cost-plus-a-fixed-fee or other cost reimbursable basis" contract. The motion to dismiss the indictment in the fourth case is not in the record before us. The motions were sustained; the indictments were dismissed; and the United States appealed.

Sections 51, 52, and 54, supra, relate to kickbacks on Government contracts. Section 51 forbids the payment of any fee, commission, or compensation of any kind, or the granting of any gift or gratuity of any kind, directly or indirectly, by or on behalf of a subcontractor, as defined in section 52, to any officer, partner, employee, or other agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment, or services of any kind on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contractor, or to any such subcontractor, either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded. Section 52 defines the term "subcontractor" for the purposes of sections 51-54. And section 54 provides that any person who shall knowingly, directly, or indirectly, make or receive any such prohibited payment shall be punished as therein specified. Considered together, these statutes are penal in character and should therefore

be construed strictly. They cannot be enlarged by implication or intendment beyond the fair meaning of the language used. But the object of all construction, whether of penal or other statutes, is to ascertain the legislative intent. And the rule of strict construction does not require that a penal statute be strained or distorted in order to exclude from its reach acts or conduct which the legislative body intended to bring within its scope. The exactions of the rule are met in full measure if the language is given its fair meaning in accordance with the obvious intent of the legislative body. Osaka Shosen Kaisha Line v. United States, 300 U.S. 98; United States v. Raynor, 302 U.S. 540, 552; United States v. Alpers, 338 U.S. 680.

Section 51, supra, is limited in reach to kickbacks given and received in connection with contracts on a cost-plus-a-fixed-fee or other cost reimbursable basis. And therefore unless the prime contract awarded to General Motors was of that kind, the indictments were fatally infirm and were providently dismissed. In a document or certificate seemingly issued in connection with a letter contract which preceded the execution of the formal prime contract, it was stated in substance that a fixed price contract was contemplated. The prime contract contained several references to it being a fixed price contract. Several supplements were designated as supplemental agreements to fixed price contract. And the prime contract provided in each instance specified unit prices for various units of aircraft and parts produced. But it did not provide that it was intended or understood to be a fixed price contract. And it provided for redetermination of prices, both prospectively and retrospectively. It provided that upon the acceptance of the seventy-first airplane, the parties should negotiate to revise the prices of all items theretofore or thereafter delivered. It further provided that after acceptance of the

two hundred and ninety-ninth airplane, the parties should negotiate to revise the prices of all items thereafter to be delivered. It further provided that the contractor should submit to the contracting officer accounting data for consideration in connection with negotiations looking toward the revision in prices. It further provided that the parties should negotiate promptly and in good faith. And it further provided that after each negotiation, the agreement reached should be evidenced by a supplemental agreement stating the revised prices to be effective with respect to deliveries on and after the effective date of the price revision. No limitation was fixed upon the range of redetermination or revision of prices, upward or downward. No ceiling or floor was specified beyond which the revised or redetermined prices could not go. The provision that upon the acceptance of the seventy-first airplane, the parties should negotiate in good faith respecting the prices of all items theretofore or thereafter delivered reasonably and impliedly contemplated that instances could and perhaps would arise in the course of fixing revised prices for items theretofore delivered which would involve reimbursement of the prime contractor for costs incurred. In other words, the provision reasonably contemplated that in the course of renegotiation and revision in prices for items theretofore delivered, reimbursement for costs incurred would be made in some instances. Not only did the provision contemplate reimbursement for costs in some instances, but the expressed obligation resting upon the Government to negotiate in good faith respecting revisions in price for items theretofore furnished impliedly required the Government to reimburse the prime contractor for costs incurred when the facts justified reimbursement. When all of the provisions in the contract are considered together as constitutent parts of a harmonious whole, it cannot be said

that the contract was exclusively a fixed price contract as distinguished from a cost reimbursable basis contract. It partook of both aspects. It was in substance and effect a fixed price and "other reimbursable basis contract". And partaking in part of an "other reimbursable basis contract", it came within the range of section 51, supra.

Reliance is placed upon regulation 3.403-3, 32 C.F.R. §3.403-3, promulgated by the Secretary of Defense to place or classify the prime contract awarded to General Motors in the class of a fixed price type of contract and therefore outside the purview of section 51, supra. It is the well settled rule of law that a regulation promulgated by an administrative agency charged with the administration of an act has the force and effect of law if it is reasonably adapted to the administration and enforcement of the act and does not contravene some statutory provision. Maryland Casualty Co. v. United States, 251 U.S. 342; United States v. Stanolind Crude Oil Purchasing Co., 113 F.2d 194. But the regulation referred to was one of comprehensive general regulations promulgated for the purpose of establishing and promoting uniform policies and procedures relating to the procurement of supplies and services under the authority of the Armed Services Procurement Act of 1947, 62 Stat. 21, as amended. It was not promulgated under section 51, supra. It is completely unrelated to the statute. And therefore it is without probative effect here.

The indictments did not charge that the donors or recipients of the kickbacks knew of the existence of the fixed price cost reimbursable basis contract between General Motors and the Air Force. Section 51, supra, forbids the "knowingly" giving or receiving of kickbacks. And the indictments charged the "knowingly" giving and receiving of the kickbacks therein referred to. But the

statute does not limit its application to persons having knowledge of the nature of the prime contract. In other words, the statute does not make knowledge of the terms of the prime contract an essential element of the offense to be charged in the indictment. Hanis v. **United States**, 246 F.2d 781.

The judgments are severally reversed and the causes are remanded with directions to deny the motions to dismiss the indictments.

APPENDIX B.

Title 41, U.S.C., Section 51:

"The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any cost-plus-a-fixed-fee or cost reimbursable contract, or by an action in an appropriate court of the United States * * *."

Section 54:

"Any person who shall knowingly, directly or indirectly make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both."

APPENDIX C.

Code of Federal Regulations, Title 32.

Sec. 3.403 Types of Contracts.—*Fixed-Price type of contract.*

3.403.1 Firm fixed price contract.

3.403-2 Fixed price with escalation clause.

3.403-3 Fixed price contract providing for the redetermination of price. Under this type of fixed price contract five types of redetermination are provided.

(1) Prospective periodic price redetermination at stated intervals.

(2) Prospective price redetermination on request.

(3) Retroactive and prospective price redeterminations at a stated time prior to completion.

(4) Retroactive and prospective price redeterminations including further prospective redetermination on request.

(5) Retroactive price redetermination after completion.

3.403-4 Fixed price incentive contract.

The regulations then proceed to provide for cost-reimbursement type contract under 3.404, entitled "Cost reimbursement type contracts," under which three types of contracts are listed as follows:

Sec. 3.404 Cost reimbursement contracts.

3.404-1 Cost contract.

3.404-2 Cost sharing contract.

3.404-3 Cost-plus-a-fixed-fee contract.

Office-Supreme Court, U.S.
FILED
AUG 20 1958
JAMES R. BROWNING, Clerk

No. 192

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY, DONALD HENRY SMALLIGAN, PETER JOHN SMEDES AND ROY HENRY STOUT, PETITIONERS

v.

UNITED STATES OF AMERICA

JOHN W. DAILEY, ROBERT E. LUKENS AND JAMES F. BOGUE, PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIAM LLOYD BARNARD, WALTER H. MORSE AND HOMER A. KELLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

DONALD HENRY SMALLIGAN, PETER JOHN SMEDES AND WILLIAM LLOYD BARNARD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 1A–12A) is not yet reported. The trial court sustained motions

to dismiss the indictments without opinion (R. 100–101, 113–114, 125–126, 130–131).[1]

JURISDICTION

The judgment of the court of appeals (SR. 20) was entered May 2, 1958. Petition for rehearing was denied on May 23, 1958 (SR. 26). On June 16, 1958, the time to file a petition for certiorari was extended to July 22, 1958. The petition for a writ of certiorari was filed July 21, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the statute prohibiting kickbacks by subcontractors under Government "cost reimbursable" contracts (41 U. S. C. 51–54) is applicable to a contract providing that the price will be "negotiated" after performance is completed.

2. Whether knowledge of the terms of the prime contract is an essential element of the crime of paying kickbacks for the award of subcontracts under Government "cost reimbursable" prime contracts.

STATUTES INVOLVED

The "Anti-Kickback Act," 60 Stat. 37, 41 U. S. C. 51–54, provides in part as follows:

> SEC. 1. The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as hereinafter defined, (1) to any officer,

[1] References to the printed record filed in the court below are prefaced by "R." References to the certified record of supplementary proceedings are prefaced by "SR.".

partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is hereby prohibited. * * * The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off * * * or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. * * *

* * * * *

SEC. 4. Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

Section 371 of Title 18, U. S. Code, as amended, provides in part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

The ten petitioners were indicted in four indictments for violations of the so-called Anti-Kickback Act, 41 U. S. C. 51–54, and for conspiracies to violate that statute (R. 1, 105, 117, 129). The indictments were dismissed upon motions by the petitioners (R. 100–101, 113–114, 125–126, 130–131). The court of appeals reversed and remanded the case to the district court with directions to deny the motions to dismiss (Pet. 1A–12A).

At all times here involved, the General Motors Corporation was the prime contractor under a contract with the Air Force for the production of F–84F jet aircraft (R. 9). Two of the petitioners were head tool buyers for General Motors, in which capacity they administered subcontracts and purchase orders awarded under the prime contract (R. 2, 106, 118, 129). The remaining petitioners were owners, officers, partners or sales managers of manufacturing companies which obtained these subcontracts (R. 2, 3, 106, 118, 129). The indictments charged the General

Motors employees with accepting, and the other petitioners with giving, gratuities as an inducement or acknowledgment for aid and assistance in obtaining purchase orders and subcontracts under the Air Force contract (R. 3, 105, 118–119, 129–130). The alleged kickbacks were either based upon a commission of 5 percent (R. 4, 119), amounting to partial payments as high as $3,004.20 (R. 4, 6, 119, 130), or took another guise, such as a gift of a clothes washer and a drier (R. 5, 6), a personal loan (R. 107), or monthly payments on a car (R. 107).

The General Motors prime contract was described in the indictments as a "fixed price reimbursable contract with a price redetermination clause" (R. 2, 106, 118). By agreement of the parties, the contract itself was introduced into the record (R. 9–94) and considered in ruling on the motions to dismiss. It provides in part as follows:

> (a) The Contractor shall furnish to the Government the articles and supplies in the quantities and at the unit and total prices set forth below, which prices are subject to the Clause of the General Provisions entitled "Revision of Prices": [R. 11]
>
> * * * * *
>
> 41. REVISION OF PRICES (RETROACTIVE FOR FIRST PERIOD).—(a) The prices in Part I may be increased or decreased in accordance with this Clause.
>
> (b) *Times for negotiation.*—Upon acceptance of the 71st airplane to be furnished under this contract, the parties shall negotiate to re-

vise the prices of all items theretofore and thereafter to be delivered. * * *

(c) *Submission of data.*—At the time * * * specified * * * the Contractor shall submit (i) a new estimate and breakdown of the unit cost and the proposed prices of the items remaining under this contract * * *; (ii) an explanation of the differences between the original * * * estimate and the new estimate; (iii) such relevant shop and engineering data, cost records, overhead absorption reports and accounting statements as may be of assistance in determining the accuracy and reliability of the new estimate; (iv) a statement of experienced costs of production hereunder to the extent that they are available at the time or times of the negotiation of the revision of prices hereunder; and (v) any other relevant data usually furnished in the case of negotiation of prices under a new contract. The Government may make such examination of the Contractor's accounts, records and books as the Contracting Officer may require and may make such audit thereof as the Contracting Officer may deem necessary.

(d) *Negotiations.*—(1) Upon the filing of the statements and data required by paragraph (c) of this Clause, the Contractor and the Contracting Officer will negotiate promptly in good faith to agree upon prices for items to be delivered on and after the effective date of the price revision. Negotiations for price revisions under this Clause shall be conducted on the same basis, employing the same types of data (including, without limitations, comparative prices, comparative costs, and trends

thereof) as in the negotiation of prices under a new Department of the Air Force contract. [R. 31–33]

On October 13, 1954, after completion of the first 71 airplanes, the parties executed a supplemental agreement substantially increasing the prices both of the 71 airplanes already delivered and of those yet to be delivered (R. 69). The indictments allege no events occurring after the date of that agreement (R. 1, 105, 117, 129).

Petitioners moved to dismiss the indictments on the grounds, among others, that the General Motors contract was not a "cost reimbursable" contract within the meaning of the Anti-Kickback Act and that the indictments did not allege that the petitioners knew the terms of the contract (R. 94–99, 108–113, 121–125). The district court dismissed the indictments without opinion (R. 100, 113, 125, 130). The court of appeals unanimously reversed, holding that the contract was on a "cost reimbursable basis" and that knowledge of the nature of the contract was not an essential element of the crime (Pet. 1A–12A).

ARGUMENT

Quite apart from the merits of the petitioner's contentions, the judgment is not final and there is no occasion to review it at this stage of the proceedings. The court of appeals remanded the case to the district court with directions to deny the motions to dismiss the indictments. There has been no trial and the petitioners have not yet been found guilty of any crime. Consequently this Court is now asked to de-

cide questions presented without benefit of any substantive testimony to clarify and develop the issues. The premature nature of the petition is emphasized by the fact that, had the motions to dismiss been denied by the district court in the first instance rather than on remand, the order would not have been appealable. *Catlin v. United States*, 324 U. S. 229, 236. For this reason alone the petition for certiorari should be denied. It will be time enough to consider whether the underlying issues merit further review after the facts have been fully developed at the trial—if, of course, the petitioners are convicted.

The decision of the court of appeals is, moreover, correct and is based on a reasonable interpretation and application of the statute. It is not in conflict with any other decision, and in the absence of such a conflict the questions presented are not of sufficient importance to require review by this Court.

1. The Anti-Kickback Act, 41 U. S. C. 51–54, is an attempt to outlaw "commercial bribery" in Government contracting. It forbids the giving of gratuities to holders of Government prime contracts, or their agents, to induce the award of subcontracts. By its terms, however, the statute applies only if the prime contract is on a "cost-plus-a-fixed-fee or other cost reimbursable basis." The primary question in this case is whether the prime contract involved falls within that category.

The proper characterization of the polar types of contracts is clear. On the one hand, the typical "cost-plus-a-fixed-fee" contract, in which the Government is expressly obligated to reimburse the contractor for

costs incurred by him, is clearly within the scope of the statute. On the other hand, the typical "fixed price" contract, in which the contractor obligates himself to perform the contract at a firm price established in advance and not affected by variations in actual cost, is equally clearly not within the statute. The difficulty arises where, as here, the contract does not fit either of these classic patterns but partakes in part of the character of each.

The instant contract neither fixes a price in advance (except as a nominal "target") nor specifically prescribes the way in which the final price is to be computed. Rather, as to the 71 airplanes involved here,[2] the contract provides simply that, after the performance has been completed and the actual costs of performance are known, the contractor and the contracting officer will "negotiate" a fair price. The question is whether, in the aspects relevant to the purposes of the Anti-Kickback Act, such a method of post-performance negotiation of prices is "more like" typical cost contracting or firm fixed-price contracting. That, in turn, depends on the reason for the distinction made by the act.

The Act itself amply discloses the reason for limiting its application to "cost reimbursable basis" contracts. In addition to the criminal penalties, the Act establishes, as a foundation for civil recovery of kickbacks, a conclusive presumption that the amount of any kickback "was included in the price of the subcontract or order and ultimately borne by the United States" (§ 1, *supra*, p. 3). In substance,

[2] See note 4, *infra*.

that is a graphic statement of the purpose of the Act: its primary concern is to protect the Government, as a contracting party, from the burden of prices inflated by kickbacks. In this light, the limitation to "cost reimbursable basis" contracts becomes readily understandable. Under such contracts the prices paid to subcontractors become costs to be reimbursed by the Government; if the subcontract price is inflated the cost to the Government is increased. Under a firm fixed-price contract, on the other hand, the contractor's actual costs are of no concern to the Government. The price—fixed by the competiton for the initial award of the contract—remains the same whether or not the contractor's experienced costs are increased because of kickbacks by subcontractors to his purchasing agents.

The proper test, therefore, of whether a prime contract should be deemed to be on a "cost reimbursable basis" for purposes of the Act is clear: would an increase in the contractor's subcontracting costs (a presumed result of kickbacks) probably be passed on to the Government? The prime contract involved in this case seems clearly to meet that test.

The "Revision of Prices" clause of the contract requires the contractor, after the first 71 planes have

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The important question, of course, is whether hidden kickbacks would be passed on. In the rare case where the kickback is discovered, the subcontract cost would presumably be partially disallowed even under a straight cost-plus-a-fixed-fee contract—for example, by treating the kickback as a reduction of the nominal price of the subcontract. It is the difficulty of discovering kickbacks in order to eliminate them from the costs that makes the imposition of criminal penalties necessary.

been delivered, to submit complete information on the cost of producing those items. The parties are then required to "negotiate" in "good faith" to "revise the prices" for those items.[4] The negotiations are to be conducted "on the same basis, employing the same types of data (including, without limitations, comparative prices, comparative costs, and trends thereof) as in the negotiation of prices under a new" contract (R. 33).[5] In addition to these standard provisions, the clause contains special provisions providing that certain specific items, the status of which might otherwise be questioned, "shall be recognized as being properly included in costs" (R. 34) or "shall be an allowable item of cost" (R. 35).

The contract thus imposes no objective standard for the determination of the price other than that necessarily implied by the duty to negotiate in "good faith"—that is, a fair and reasonable price. Clearly, in the absence of some extraordinary circumstance such as gross waste, that means that the contractor would normally be allowed to recover his costs plus a reasonable profit. What other general standard there might be to guide the negotiations in the usual case

[4] The parties are required at the same time to negotiate revised prices for the items yet to be delivered, but since all the alleged acts occurred during the production of the first 71 planes—*i. e.*, the retroactive-pricing phase of the contract—the method of pricing the subsequent deliveries is not in issue.

[5] Although not expressly so limited, this provision seems meaningful primarily in terms of the *prospective* pricing of the undelivered planes. See note 4, *supra*. It is not included in the standard clauses providing for a single price revision after completion of the entire contract. Compare Form II–B (¶ (d) (1)) with Form IV (¶ (c)) in 32 C. F. R. § 596.150–5 (1958 Supp.).

is not readily apparent. That such was the contemplation of the parties here, moreover, is directly evidenced by the special provisions providing for the allowability of certain items of cost that might otherwise have been matters of dispute.

Nor does such an interpretation of price redeterminable contracts destroy their virtue as an alternative method of contracting to contracts expressly providing for the reimbursement of costs plus a fixed fee. On the one hand they allow greater flexibility in resolving the inevitable disputes concerning the proper determination and allocation of costs. On the other hand—and this would seem to be their primary purpose—they do not fix the contractor's profit in advance but rather allow his efficiency and ingenuity in performance to be taken into account in negotiating the profit, thus preserving the contractor's incentive to minimize costs.

That retroactive negotiation of prices tends inevitably towards the allowance of costs plus a profit has been expressly recognized by the Comptroller General, who has cautioned against its administration in a way (that is, with an uncritical allowance of a standard percentage of profit) which would violate the statutory prohibition against the cost-plus-percentage-of-cost method of contracting. 33 Comp. Gen. 533; 33 Comp. Gen. 291.

The nature of this method of contracting is revealed even more clearly by the consequences of a failure by the parties to agree on a redetermined price. In that event, the contract provides that the contracting officer shall unilaterally determine the price subject to an appeal by the contractor to the

Armed Services Board of Contract Appeals. See ¶ (c) of the Price Revision clause (R. 33) and the Disputes clause (R. 25). The Board, in turn, consistently decides such appeals simply by determining whether disputed items of cost are "allowable" and adding to the costs thus determined what it considers to be a "fair" profit. See, *e. g.*, *Russell B. Gannon Co.*, ASBCA Nos. 1199 and 1388 (Dec. 14, 1953); *General Box Co.*, ASBCA No. 1737 (Aug. 18, 1954); *Polytechnic Research & Devel. Co.*, ASBCA No. 1995 (Oct. 13, 1954); cf. *Arco Mfg. Co.*, ASBCA No. 1117 (Feb. 10, 1954).[6] Since the decisions of the Board are subject to only a very limited review in the courts (see *United States* v. *Wunderlich*, 342 U. S. 98; 68 Stat. 81, 41 U. S. C. (Supp. V) 321), its decisions, for all practical purposes, establish the "law" governing such provisions.

Thus the contractor does, as a practical matter, have a "right" to be reimbursed for his actual costs. If the contracting officer will not agree to a price allowing such costs, the contractor may obtain relief by an appeal to the Armed Services Board of Contract Appeals. It follows that any increase of subcontracting costs caused by hidden kickbacks would be passed on to the Government. For this reason it seems clear that contracts providing for retroactive price redetermination, whatever their characterization for other purposes should be classified as "cost reimbursable" contracts for purposes of the Anti-Kickback Act.

[6] See also Board member Green's statement of the standards applied in such cases, *Costing and Pricing in Contract Appeals Procedures*, 18 Fed. B. J. 183, 189-196 (1958).

2. Petitioners base their argument almost exclusively upon the labels on the contract and the nomenclature used by the military departments to describe such contracts. Admittedly such contracts are generally referred to as "fixed-price contracts subject to price redetermination." That, literally, is what they are, for in the original negotiations of the contract a "fixed price" is indeed arrived at as a target. Nor is the target meaningless, for, supported as it is by detailed cost estimates, it indicates what the parties considered to be a reasonable profit on their admittedly uncertain assumptions as to the likely costs. Both the original cost estimates and the original profit margin provide a guide in the subsequent negotiations in determining how efficient the contractor has been and what a reasonable profit is. The important question, however—to which petitioners hardly address themselves—is not whether the words "fixed price" appear in the description of such contracts but whether making them "subject to price redetermination" so affects their nature as to bring them within the scope of the Anti-Kickback Act.

So also is it irrelevant whether such contracts are deemed to be within the purpose and scope of other regulatory or statutory provisions applicable to "cost" contracts. "Cost contracts" is not a descriptive phrase of immutable content; its meaning must depend in each case upon the background of the provision and the purpose sought to be served by it.

3. Petitioners contend that knowledge that the prime contract is a "cost reimbursable" contract is an essential element of the crime charged and that the

indictments are defective in failing to allege such knowledge. There is no basis for the contention, and the only other case on the question is fully in accord with the decision below. *Hanis* v. *United States*, 246 F. 2d 781 (C. A. 8).

Section 4 of the Act, the criminal provision, requires only that the "person * * * shall knowingly, directly or indirectly, make or receive any such prohibited payment." Under § 1, the civil provision providing for recovery of the payment, the payment is "prohibited" if it is *intended* as an "inducement" for a subcontract and if *in fact* the prime contract is a Government cost contract. Clearly, therefore, the only criminal intent required is the intent to bribe. The defendant need not know that the bribe was made under such circumstances as to be a federal crime—any more than a bank robber need know that the bank is a national bank (*Reynolds* v. *United States*, 67 F. 2d 216 (C. A. 9)) or a thief, that the goods were in interstate commerce (*Clark* v. *United States*, 213 F. 2d 63 (C. A. 5)). As in those cases, Congress here simply limited the scope of the Act to circumstances in which the United States has a sufficiently direct interest to make the exercise of federal jurisdiction appropriate. While the existence of those circumstances is essential to jurisdiction, knowledge of them is no more an element of the crime than is knowledge of the terms of the statute.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 192.

WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY, DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and ROY HENRY STOUT, *Petitioners,*

vs.

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PETITIONERS' REPLY BRIEF.

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ARGUMENT.

The government says, with studied nonchalance, "The important question, of course, is whether hidden kickbacks would be passed on" (Br. 10, ft. note 3). This is not an important question—it is not even material. The only question on this phase of the case is whether a fixed price

contract with a redetermination clause is contemplated by the statute. The Government skirts around this decisive issue but does not quite come to grips with it; rather the writer contents himself with arguments which say no more than that he feels there are possible evils in the administration of such a contract, and it "should be" within the Statute.

The statute refers only to cost-plus-a-fixed-fee and other "cost reimbursible contracts." The only known definition of such contracts *excludes* a fixed price contract with a redetermination clause (Appendix 15A). And this definition was promulgated by an agency of the Government (Defense Department) which was a party to the contract in question, *and* which urged Congress to pass the Anti-Kickback Statute (U. S. Code, Congressional Service, 1946, p. 1083). This should be the end of the matter. However, the Justice Department of the United States Government does not like the definitions of the Defense Department of the United States Government (which is supposedly the injured party here). It prefers a definition which will permit a conviction. We feel that the Justice Department had in mind the Defense Department Regulations and Definitions when it wrote its brief. However, it was able to dismiss them from its mind, without specifically referring to them, with the statement that " 'Costs contracts' is not a descriptive phrase of immutable content." (Br. 14).

Freedom or imprisonment for these defendants depends upon the definition of a term. The definition that will free them is promulgated and published by the United States Government, which is now prosecuting them. The definition that will free them was accepted by the contracting parties at the time of the alleged acts of defendants, and is *still* accepted by the Defense Department in similar contracts. But now the Government says we must

use a definition that will imprison them. Is this fair? Is this compatible with the rule that we must not enlarge the scope of a criminal statute or adopt a strained construction in order to bring the act of a defendant within its terms? The Government says "yes" to these questions. The reason? Simple, says the Government. The term "is not a descriptive word of immutable content."

The Government persists in stating a proposition which is not at all relevant, and then proceeds to "win" its argument on such "issue." For example, on page 8 it is said "the question is" whether our contract is "'more like' typical cost contracting or firm fixed-price contract." Since it is *not* a cost contract, it does not make one particle of difference whether it's more like a cost contract, or more like something else. Tobacco is more like marijuana than milk and honey. But a prohibition of the sale of marijuana is not a prohibition of the sale of tobacco.

The Government's argument seems to be based primarily on the proposition that, since the parties in renegotiating the price, would take costs into consideration, the parties in "good faith" would try to arrive at a "fair and reasonable price," and that "normally" a contractor would be allowed his costs plus a reasonable profit (Br. 11), therefore, the contract in question "should be" so classified as to come within the Anti-Kickback Act (Br. 13). These arguments apply to *all* contracts, for every seller attempts to "pass on" his costs to the buyer and in addition to make a reasonable profit.

In making such an argument, the Government is embarrassed by the fact that, in negotiating a new price, the parties are not rigidly controlled by the costs (as is the case under a cost reimbursible contract), but negotiate exactly as they would negotiate "prices * * * under a new

* * * contract," and must take into consideration "comparative prices, comparative costs and trends thereof, shop and engineering data and overhead absorption reports." (R. 33, 32, Br. 11). However, the Government brushes this provision aside as not being "meaningful" here. We submit that the reason given for the argument is unusually novel: Since the above language is not contained in "standard clauses" of a certain form of contract (not here involved) with which the writer of the Government's brief happens to be acquainted, therefore, it must not be "meaningful" when found in the contract that *is* here involved (Br. 11, ft. note 5).

The government makes concessions in its brief which are fatal to its position. For example, that the contract in question allows for the practice of "efficiency" by the contractor and preserves the contractor's "incentive to minimize costs" (Br. 12). This characteristic is *absent* in a cost reimbursible or cost-plus-a-fixed fee contract, and its absence is the reason those two types of contracts, and those alone, are mentioned in the Anti-Kickback Act. Another concession is that the contract in question imposes no *standard* for the determination of prices (Br. 11). In a cost reimbursible contract there is a definite, unequivocal standard—costs.

The Government lays great stress on the "fact" that the prices were to be retroactive as to the first 71 airplanes. The contract is confusing and ambiguous on this point. In Sec. 41 (b) (R. 31) it specifically states that they shall be retroactive. Then in subparagraph (d) (R. 32) it says the parties will negotiate to agree upon prices for items to be delivered *on and after the effective date of the price revision*. But suppose the contract *clearly* provides for retroactive prices, what difference does it make?

The Government would have us believe that there are two types of contracts of distinct origin and pure blood, firm fixed price and cost reimbursible, one good and one bad; that by some freak of nature or careless breeding, a cross between the two occurs, and we have a fixed price contract with a redetermination clause; that we must examine and dissect this strange progeny to determine whether the genes of the mother or father predominate. This is not true. It is an accepted and well recognized type of contract and, just as its name implies, it is a fixed price contract, and is so classified by the agency which conceived it (App. 15A). Since it is not covered by the statute, we are not here concerned with the possible effect of its detailed provisions. The Tenth Circuit Court of Appeals accepted the essential part of the Government's argument, but concluded that the contract was a two-headed monster (App. 11A), with one head having a cost reimbursible look, and the other giving every appearance of being fixed price. However, the Court apparently decided that the latter should be ignored and only the former given recognition, resolving all doubt in favor of the Government and against defendants.

The Government argues that it is not necessary that the indictment charge that defendants knew the prime contract was cost-plus-a-fixed fee, or cost reimbursible. In doing so, it falls into the error (as did the Eighth Circuit Court of Appeals in *Harris* v. *United States*, 246 F. 2d 781) of comparing our case to those cases in which, although defendant knew he was committing a crime (such as bank robbery), he did not know whether the federal or state Courts would have jurisdiction to try him. The argument is specious, and hardly requires an answer.

The Government argues that this Court should not grant certiorari because there should first be a trial and

conviction. Where a determination of the issues is fundamental to the further conduct of the case, this Court will grant certiorari. *Land* v. *Dollar*, 67 S. Ct. 1009, 330 U. S. 731; *United States* v. *General Motors Corporation*, 65 S. Ct. 357, 323 U. S. 373. Furthermore, the reason that the contract is in the record is because it was agreed by the Government and defendants that, with the contract before the Court, a final determination of the issues could be made; and, if favorable to defendants, thereby avoid a long and expensive trial. Now the Government says that the "final determination before the trial" should be the first stage at which it gets a favorable ruling. These issues must be decided by this Court at some time. Also, we would like to point out that the Government's appeal from the trial Court's ruling in favor of defendants should have been to this Court, rather than the Court of Appeals, as it admittedly involved the interpretation of a Federal Statute.

We submit that the Government's brief does not in any way answer our petition and for the reasons given in said petition and in this reply, the writ should issue.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITIONERS' REPLY BRIEF

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The Court has requested a response to the following sentence of petitioners' reply brief (p. 6): "Also, we would like to point out that the Government's appeal from the trial Court's ruling in favor of defendants should have been to this Court, rather than the Court of Appeals, as it admittedly involved the interpretation of a Federal Statute." That contention, raised for the first time in the reply brief, calls into question the jurisdiction of the court of appeals under the Criminal Appeals Act, *infra*, to entertain the government's appeal from the orders of the district court dismissing the indictments.

The pertinent provisions of the Criminal Appeals Act, 18 U. S. C. 3731, are as follows:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> * * * * *
>
> If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Under that Act, a dismissal of an indictment is appealable directly to this Court if the dismissal "is based upon the invalidity or construction of the stat-

ute upon which the indictment or information is founded." Otherwise it is appealable to the court of appeals. Petitioners' position is that the district court's dismissal of the indictments in this case was "based upon" a "construction" of the Anti-Kickback Act and was therefore appealable only to this Court. Our response is that (1) the appeal was properly taken to the court of appeals, and (2), in any event, there is no occasion for this Court to consider the jurisdictional question in ruling on the petition for certiorari.

1. The provision in the Criminal Appeals Act for direct appeals to this Court has been consistently construed by this Court "to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute." *United States* v. *Petrillo*, concurring opinion of Frankfurter, J., 332 U. S. 1, 14, citing *United States* v. *Hastings*, 296 U. S. 188, 192, 194; *United States* v. *Borden Co.*, 308 U. S. 188, 193; *United States* v. *Swift & Co.*, 318 U. S. 442. See also *United States* v. *Jones*, 345 U. S. 377; *United States* v. *Wayne Pump Co.*, 317 U. S. 200, 208. And the scope of review in this Court on such an appeal is limited to the issue of statutory construction or validity upon which the decision of the district court was based. "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, *supra*. See also *United States* v. *Hastings*, 296 U. S. 188, 192; *United States* v. *Kissel*, 218 U. S. 601, 606–607; *United States* v. *Keitel*, 211 U. S. 370, 397–399.

The district court's orders dismissing the four indictments are silent as to the reasons for the court's action (R. 100–101, 113–114, 125–126, 130–131). Those reasons can be determined, if at all, only by inference from the grounds for dismissal asserted in the motions to dismiss (R. 94, 96, 98, 108, 111, 121, 122, 123). The grounds may be summarized as follows: (1) the indictments do not state facts sufficient to constitute an offense against the United States; (2) the contract between the Air Force and General Motors Corporation (which was not part of the indictments, but was submitted for the court's consideration on the motions) was contemplated to be, interpreted and denominated a "fixed price" contract and not a "cost reimbursable" contract within the meaning of the Anti-Kickback Act; (3) the alleged kickbacks would not be included in the price or ultimately borne by the United States and were therefore not within the contemplation of the statute; (4) since the contract was classified, petitioners did not and could not know or have knowledge of the nature of the contract; and (5) the contract does not show approval in writing by the Secretary of the Air Force and therefore is not binding and cannot constitute a "contract" under the statute. Thus, the possible grounds for decision were (1) a failure of the indictments fully to plead an offense, (2) an interpretation of the contract, (3) a construction of the statute, or (4) a construction of the contract and the statute.

It is clear enough from the competing contentions urged by the parties that the primary issue between them throughout has been one of interpretation of the

contract, with petitioners contending that it is a fixed-price contract with a redetermination clause and, as such, not within the coverage of the statute, while the government claims that it is a cost-reimbursable contract within the statute. As petitioners state in their reply brief (p. 6), "the reason that the contract is in the record is because it was agreed by the Government and defendants that, with the contract before the Court, a final determination of the issues could be made; and if favorable to defendants, thereby avoid a long and expensive trial." The opinion of the court of appeals, the petition for a writ of certiorari, the government's brief in opposition, and petitioners' reply brief are replete with references to the terms of the contract and their meaning.[1] The issues tendered by the petition for certiorari are (1) whether the terms of the contract constitute it a "cost reimbursable" contract within the meaning of the statute and (2) whether knowledge of the nature of the contract on the part of petitioners is a necessary allegation in the indictment. The resolution of the issue as to the applicability of the statute inevitably involves an interpretation and characterization of the contract. At best, the question is a mixed one of inter-

[1] After reviewing the provisions of the contract, the court of appeals said (255 F. 2d. at 688): "When all of the provisions in the contract are considered together as constituent parts of a harmonious whole, it cannot be said that the contract was exclusively a fixed price contract as distinguished from a cost reimbursable basis contract. It partook of both aspects. It was in substance and effect a fixed price and 'other reimbursable basis contract'. And partaking in part of an 'other reimbursable basis contract', it came within the range of" the Anti-Kickback Act.

pretation of the contract and the statute. Certainly it cannot be said that the issues tendered to and decided by the district court, even as elucidated and clarified by the arguments advanced in the court of appeals and here, involved exclusively a question of construction of the statute. If such had been the case, there would have been no occasion to submit the contract to the court for its consideration in deciding the motions to dismiss. In these circumstances, the limitations upon this Court's jurisdiction under the Criminal Appeals Act, as enunciated in the cases cited above, required that the appeal be taken to the court of appeals.

2. While, for the foregoing reasons, we believe that the appeal was properly taken to the court of appeals, we submit that that question need not be considered or resolved by this Court in passing on the petition for a writ of certiorari and that the existence of that question affords no occasion for the granting of the writ.

The question suggested by the petitioners' reply brief can be reviewed by this Court only on certiorari. While that question turns on whether the appeal should have been to this Court—and thus indirectly involves the appeal jurisdiction of this Court—the precise question is whether the *court of appeals* erred in taking jurisdiction of the appeal. Clearly there is no right of appeal to this Court from such a decision by the court of appeals and the proper method of review of that question—like other questions going to the court of appeals' jurisdiction—is by certiorari. If this Court should grant certiorari and reverse the court of appeals on the jurisdictional question, it could

then, of course, proceed to dispose of the case as an appeal from the district court certified to it by the court of appeals under the Criminal Appeals Act.[2] But the appeal jurisdiction of this Court is not, and on the present record cannot be, invoked unless the Court first grants certiorari and reverses the court of appeals' decision as to its jurisdiction. In the present posture of the case, accordingly, the only question before the Court is whether it should grant certiorari to review the judgment of the court of appeals.

On that question—whether to grant certiorari—it is submitted that the latent jurisdictional question, not having been stated as a question presented in the petition, is not entitled to consideration as a reason for granting the writ. Moreover, that question was

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[2] The Act provides (18 U. S. C. 3731, last paragraph):

> If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Thus the effect of a holding that the court of appeals lacked jurisdiction in this case would be, not that the court of appeals should have dismissed the appeal, but that it should have referred the appeal to this Court. See *United States* v. *Wong Pang Chu*, 317 U. S. 200, 209; cf. *United States* v. *Jones*, 319 U. S. 377. Rather than vacate the court of appeals' judgment and remand the case to that court for the formality of a certification of the case back to this Court, it would seem appropriate for the Court, if on certiorari it concluded that the court of appeals was without jurisdiction, simply to vacate the court of appeals' judgment and thereafter proceed with the case as an appeal certified to it under the Criminal Appeals Act.

neither raised nor expressly considered by the court of appeals, and petitioners clearly have no claim to certiorari to review a question they failed to raise below. Finally, as we have pointed out, the jurisdictional question depends, in this case, solely upon the characterization of an ambiguous and unexplained ruling by the district court; its resolution turns upon an analysis of the particular facts and presents no question of general applicability requiring review by this Court.

For these reasons, we submit that there is no occasion for the Court to consider at this time the jurisdictional question suggested in petitioners' reply brief.[3] Rather, the petition for certiorari should be judged solely on whether the questions presented on the merits should be reviewed by this Court. For the reasons stated in our brief in opposition, we believe that those questions do not merit review by this Court.

---

[3] Indeed, the Court may find it unnecessary to consider the jurisdictional question even if it should grant certiorari. Whatever the Court concluded on that question, it would still need to dispose of the case on the merits—either as a review of the court of appeals' decision or as an appeal from the district court "certified" to it by the court of appeals (see note 2, *supra*). While that procedural distinction might affect the form of the mandate (whether the judgment of the court of appeals is vacated or is affirmed or reversed), it is doubtful whether, on the facts of this case, it would be of any other significance. If so, we suggest that the Court, rather than take *sua sponte* a question on which nothing of substance turned, would be justified in declining to consider the question and in proceeding to dispose of the case in the posture in which it was presented—*i. e.*, as a review on certiorari of the decision of the court of appeals.

and, accordingly, that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1958.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 192.

WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

SUPPLEMENTAL MEMORANDUM OF PETITIONERS.

The Government has no right to an appeal in a criminal case except as expressly permitted by the Criminal Appeals Act, 18 U. S. 3731.[1] Hence, the issue raised by peti-

[1]See *U. S.* v. *Sanges*, 144 U. S. 310, 36 L. Ed. 445, 12 S. Ct. 609, discussing the common law right of the government to appeal a criminal case. *U. S.* v. *Bitty*, 208 U. S. 393, 52 L. Ed. 543, 283 S. Ct. 396; *U. S.* v. *Heinze*, 218 U. S. 532, 54 L. Ed. 1139, 31 S. Ct. 98.

tioner's Reply Brief concerns the very *jurisdiction* of the Court of Appeals to have accepted appellate review of the Government's appeal in the first instance. Jurisdiction could have been challenged by petitioners or by the Court itself on its own motion.

The issue of jurisdiction of the Court of Appeals over the Government's appeal may, therefore, be properly considered by this Court at this time.

The Tenth Circuit Court of Appeals Was Without Jurisdiction and Its Judgment Is Void.

The first point made by the Government is that its appeal was properly lodged in the Court of Appeals because the dismissal of the indictment by the District Court was, or may have been, based on grounds other than the interpretation of the statute.

It cannot be presumed that the Court dismissed the indictment for some reason other than the grounds stated in the various motions. (See R. 100 and 113 where the Court uses the words "for the reasons stated in defendant's said motion" and "for the grounds and for the reasons stated in defendants' said motion".) All of the grounds in all of the motions involved the interpretation and application of the statute. It is true that some of the motions (R. 94, 96, 108) commence with the general statement that the indictment "does not state facts sufficient to constitute an offense against the United States." However, in each such instance the general statement is followed immediately by the allegation that the indictment is insufficient because it alleges that the contract was a "fixed-price reimbursable contract with a price redetermination clause," whereas the statute applies only to "cost plus a fixed fee or other cost reimbursable contracts." In *United States* v.

Hastings, 296 U. S. 188, it was held that the dismissal of the indictment was based exclusively on the construction of a statute. The first ground was "that said indictment failed to charge any offense against the laws of the United States." This Court said, l. c. 194:

> "* * * The first ground may fairly be regarded as not a distinct ground, or a finding of the insufficiency of the indictment as a mere matter of pleading, but as intended to be an introduction to the specifications which follow and to be read in their light. * * *"

In *United States* v. *Wayne Pump Co.*, 317 U. S. 200, cited by the Government, the motion by defendant attacked the indictment as being indefinite and uncertain in its allegations. None of the motions in the case at bar attack the *form* of the indictments.

By agreeing that the contract could be considered by the Court in ruling on the motion to dismiss the indictments, the contract became, in effect, a part of the indictment, as further clarification of the phrase "fixed-price reimbursable contract with redetermination clause" used in the indictment.

For the Government to say that the dismissal involved a finding that the indictment was insufficient, and involved an interpretation of the contract, hardly resolves the issue. No criminal statute can ever be construed by a Court unless someone is charged with its violation. The Government answers its own argument when it says (p. 5):

> "The resolution of the issue as to the applicability of the statute inevitably involves an interpretation and characterization of the contract."

This court in *U. S.* v. *Wayne Pump Co.*, 317 U.S. 200, 207, stated in that connection:

"Yet, the essence of the ruling would be based upon a construction of the statute."

When the Government appealed from the order dismissing the indictments, its "statement of points relied upon" were identical as to each of the indictments (R. 102, 115, 127, 133), and were (1) that the indictment stated facts sufficient to constitute an offense under the applicable statutes (naming them), and (2) that the contract in question was "on a cost-plus-a-fixed fee or other cost reimbursable basis within the purview of sections 51, 52, and 54, U. S. C. A., Title 41." In its brief in opposition to the petition for certiorari the Government says (p. 8) that the decision of the Court of Appeals, reversing the District Court's decision, is "correct and is based on a reasonable interpretation and application of the statute."

Furthermore, in the District Court and before the Court of Appeals, petitioners contended that when the statute involved makes criminal the kick-back practices defined therein, when "knowingly" done, such language means that the defendants must not only have knowledge of the kick-back, but also must have knowledge that the prime contract is of a type that makes the kick-back prohibited. The District Court so construed the statute. The Court of Appeals arrived at a contrary construction of the statute.

Clearly, every issue raised by defendants' motions for dismissal before the District Court, argued in the Court of Appeals and even briefed by both petitioners and respondent on this petition turns upon a construction of the Anti-Kickback Statute as applied to the contract under consideration.

This Court Should Enter an Order Vacating the Judgment of the Court of Appeals.

The Government makes an argument under the numeral "2" in which it discusses what action the Court should take if it is decided that the Court of Appeals had no jurisdiction. We must confess that it is not clear to us what the Government believes the Court should do. In the first full paragraph on page 6 it is stated that the Court cannot grant certiorari for that reason. In the next paragraph it is stated that certiorari is the *only* method by which the matter can be considered. In the footnote on page 7 it is suggested that the Court might vacate the Court of Appeals' judgment and consider this matter as if it were an appeal by the Government from the order of the District Court. Finally, on page 8 it is suggested, in effect, that the Court should forget the whole thing, deny our petition for a writ, and let the void judgment of the Court of Appeals stand.

It is the duty of the Supreme Court to determine from the record whether or not the Court below had jurisdiction, even though the question is not raised by either party at any time. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449. When it is determined that the Court of Appeals acted without jurisdiction in entertaining an appeal, the appropriate action is for the Supreme Court to reverse the decree of the Circuit Court of Appeals and remand the case with directions to dismiss the appeal for want of jurisdiction. *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10. Under those circumstances the dismissal of the appeal is the only action that can be taken. There is not even power to award costs against the defeated party. *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640.

If the Court follows the principles laid down in the above decisions, it is obvious that the judgment of the District Court is final; and has been final and unimpeachable for some time, since the time for the Government to appeal directly to the Supreme Court has long since passed. The only possible argument that could be made against this result would be based on the provision of Title 18, U. S. C., Sec. 3731, to the effect that if the Circuit Court of Appeals is of the opinion that the appeal should have been taken to the Supreme Court, it shall certify the case to the Supreme Court. The Government did not file its appeal in the Supreme Court, and the Court of Appeals did not certify the case to this Court. It would be extending the provisions of the statute to accept defendants' motion for certiorari as an appeal by the Government.

It is suggested by the Government that the Court might send the matter back to the Court of Appeals and order it to certify the case back to the Supreme Court. Taking into account the general principles applying to appeals by the Government in criminal cases, and taking into account the provisions of the statute, we do not believe that such a procedure was contemplated. The right of the Government to appeal was considered at length in *Carroll et al. v. United States*, 354 U. S. 394. It is noted that appeals by the Government in criminal cases are unusual, exceptional, and not favored; that they can arise only from the clear mandate of a statute, and that such a statute will be strictly construed and will be carefully restricted in its operations to the situations authorized by the statute.

The statute obviously contemplates that the question of certifying the case to the Supreme Court must be resolved, if at all, before a judgment is entered. The statute also provides that an appeal shall be taken within 30 days "and shall be diligently prosecuted". If the Government

can at this time assert its right to appeal to the Supreme Court, when would that right expire? If the judgment of the Court of Appeals is void, it could be attacked ten years after its entry. Could the Government at that time secure permission to appeal to the Supreme Court? If the judgment of the Court of Appeals is void, and if the Government is still permitted to prosecute its appeal to this Court, the result would be that the Government is given an extension of time in which to file its appeal. This cannot be done by this Court, nor by any Court below. *United States* v. *Hark*, 320 U. S. 531. If our interpretation of the statute is technical, then it can also be said that it is technical to set a time limit during which the original notice of appeal must be filed. All statutes granting a right of appeal contemplate that there must at some time be an end to the matter. We believe that the interpretation of Sec. 3731 suggested by the Government would mean that there is never an end to an appeal by the Government in a criminal case.

The Government is the only party having a right to appeal under the statute now under discussion, and from its every day experience, should have some idea as to where the appeal should be taken. If there is any doubt in its mind (and we think there could have been none in this case), it can protect itself by ascertaining the proper forum *before* the matter is considered and a ruling is made.

We submit that, on the record, the Court of Appeals judgment is void; that this Court should enter an order vacating that judgment and ordering the Tenth Circuit Court of Appeals to dismiss the appeal in that Court; that this Court should enter such an order without further proceedings herein. If this Court is of the opinion that the Tenth Circuit Court of Appeals *did* have jurisdiction, then

we submit that our petition for certiorari should be granted for the other reasons mentioned therein.

Respectfully submitted,

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